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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

JOAN BYRD et al.,

Plaintiffs and Appellants,

v.

COUNTY OF FRESNO et al.,

Defendants and Respondents.

F070597

(Super. Ct. No. 14CECG01502)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Carlos A. Cabrera, Judge.

Michael T. Risher and Novella Y. Coleman for Plaintiffs and Appellants.

Aleshire & Wynder, Jeff M. Malawy; Douglas T. Sloan and Francine M. Kanne for Defendant and Respondent City of Fresno.

Best Best & Krieger, Jeffrey V. Dunn and Seena Samimi for Defendant and Respondent County of Fresno.

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Appellants filed a combined petition for writ of mandate and complaint for declaratory and injunctive relief to challenge medical marijuana ordinances adopted by

the County of Fresno (County) and the City of Fresno (City). The ordinances prohibit the cultivation and storage of medical marijuana within each jurisdiction.

Appellants allege the ordinances were unconstitutional because they conflict with state marijuana statutes, including the Compassionate Use Act (Health & Saf. Code, § 11362.5)¹ and the Medical Marijuana Program (§ 11362.7 et seq.).

The trial court dismissed the petition for writ of mandate on the grounds that appellants failed to demonstrate they had no plain, speedy, and adequate legal remedy. The court noted that appellants' causes of action for declaratory relief and injunctive relief showed writ relief was neither necessary nor proper in this case.

We conclude that trial courts have the discretion to dismiss a petition for writ of mandate when it finds the petitioner has a plain, speedy and adequate remedy at law. (See Code Civ. Proc., § 1086.) In this case, appellants have not established that the trial court prejudicially abused its discretion by dismissing the petition and allowing appellants to proceed with their complaint for declaratory and injunctive relief.

We therefore affirm the order dismissing the petition for writ of mandate.

FACTS

Appellants

Appellant Joan Byrd is a resident of Fresno, California and was 67 years old when she filed this lawsuit. Byrd is a retired employee of the Fresno County Sheriff's Department who was electrocuted while working at the jail. She suffered (1) a traumatic brain injury causing memory loss and anxiety, (2) broken teeth and several hairline fractures in her jaw resulting in infections and loss of teeth, and (3) herniated disks in her neck and back. Byrd also suffers from fibromyalgia, severe osteoporosis and gastrointestinal problems caused by a botched gastric bypass surgery. Byrd has a

¹ All unlabeled statutory references are to the Health and Safety Code.

recommendation from her physician to use medical marijuana to alleviate her pain, anxiety and nausea.

Byrd lives on a fixed income and her health insurance provider often changes what medications it will cover. As a result, it is difficult for Byrd to consistently use the medication prescribed by doctors. Byrd alleges that she is concerned about driving outside Fresno County to obtain medical marijuana because of the cost and the exposure to criminal penalties if she is stopped while transporting it in her car.

Appellant Susan Juvet is a resident of Fresno, California and uses medical marijuana to treat the pain resulting from her arthritis and fibromyalgia, which she has had since she was 11 years old. She has allergic reactions to prescription pain medication, particularly those containing morphine and other opiates. One such allergic reaction necessitated the removal of 18 inches of her colon, which further complicated Juvet's ability to use prescription medication. Also, the prescription medication for fibromyalgia causes her terrible swelling and itching. Juvet has a recommendation from her physician to use medical marijuana and, in the past, has grown her own plants in a secure area of her property without encountering problems. One reason Juvet wished to use medical marijuana grown by her is the risk that medical marijuana obtained elsewhere will contain pesticide residue that will cause her to have an allergic reaction.

Ordinances

In January 2014, County's board of supervisors considered and unanimously adopted Ordinance No. 14-001, which amended the Fresno County Code (FCC) and prohibited medical marijuana dispensaries and cultivation "in all zone districts in the County."² (FCC, §§ 10.60.050 & 10.60.060)

² Ordinance No. 14-001 was not the first enactment by County to address medical marijuana. "In September 2010, the Fresno County Board of Supervisors, citing recent violence, passed an emergency initiative to ban the outdoor cultivation of medical marijuana." (Starr, *The Carrot and the Stick: Tailoring California's Unlawful Marijuana*

In March 2014, the city council of the City voted six to one to adopt Ordinance No. 2014-20 and amend the Fresno Municipal Code (Municipal Code).³ As a result, Municipal Code section 12-2104 states: “Marijuana cultivation by any person, including primary caregivers and qualified patients, collectives, cooperatives or dispensaries, is prohibited in all zone districts within the city.”

The administrative penalties imposed for each marijuana plant cultivated were set at \$1,000 per plant plus \$100 per plant for each day the plant remained unabated after the deadline specified in the administrative citation. (FCC, § 10.64.040(A); Municipal Code, § 12-2105(b).)

PROCEEDINGS

In May 2014, appellants filed a petition for writ of mandate. About a month later, appellants filed a verified first amended petition for writ of mandate and complaint for declaratory and injunctive relief against both the County and the City. Appellants addressed the issue of standing by alleging they owned real property in the City and paid property taxes on that property within the last year.

Two weeks after appellants filed their amended pleading, they submitted an ex parte application for alternative writ of mandate and order to show cause. The ex parte aspect of the application was supported by allegations that (1) City’s ordinance would go into effect on July 25, 2014, and (2) a hearing date for a noticed motion was not available until October. The application requested a writ prohibiting County and City (1) from

Cultivation Statute to Address California’s Problems (2013) 44 McGeorge L.Rev. 1069, 1087 (*Starr*).)

³ City, like County, had addressed medical marijuana earlier. “In December 2011, the City of Fresno passed [an outdoor cultivation] ban after a man was killed trying to steal marijuana from an outdoor cultivation site. In January 2012, the city extended the ban, asserting that outdoor marijuana cultivation led to violent crime.” (*Starr, supra*, 44 McGeorge L.Rev. at p. 1087, fns. omitted.)

enforcing the medical marijuana ordinances and (2) from entering onto private property to enforce their laws relating to marijuana without a warrant complying with the statutory and constitutional requirements for search warrants.

The trial court did not hold a hearing on the ex parte application. In September 2014, after considering the papers submitted, the court filed an order denying the ex parte application for an alternative writ of mandate and dismissing the writ petition. The court explained its decision by stating:

“Generally, a writ will lie when there is no plain, speedy, and adequate alternative remedy; the respondent has a duty to perform; and the petitioner has a clear and beneficial right to performance. (Code Civ. Proc., §§ 1085, 1086; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 925.)

“Here the Verified First Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief fails to allege any facts demonstrating that plaintiffs lack a plain, speedy, and adequate legal remedy. Instead, the existence of causes of action for declaratory relief and injunctive relief demonstrate that writ relief was neither necessary nor proper in this instance.”

Consistent with this rationale, the trial court stated its order did not affect the validity of the complaint for declaratory and injunctive relief.

In October 2014, appellants filed a voluntary request for dismissal of their complaint without prejudice, which was entered as requested. After notice of entry of the dismissal was served, appellants appealed from the September 2014 order denying their ex parte application for an alternative writ of mandate.

DISCUSSION

I. OVERVIEW OF PRINCIPLES GOVERNING WRITS OF MANDATE

A. Statutes

A writ of ordinary mandate may be issued against a public body or public officer “to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station” (Code Civ. Proc., § 1085, subd. (a).) Two

requirements essential to the issuance of the writ are (1) a clear, present and usually ministerial duty upon the part of the respondent and (2) a clear, present and beneficial right in the petitioner to the performance of that duty. (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491.)

Section 1086 of the Code of Civil Procedure provides that a writ of mandate “must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.” The use of the word “must” means that the issuance of a writ is mandatory when the essential requirements are met *and* an adequate legal remedy is not available. (*May v. Board of Directors* (1949) 34 Cal.2d 125, 133-134.)

In contrast to situations where there is no adequate legal remedy, the Legislature has not expressly identified how a trial court should proceed when it finds that there is a plain, speedy, and adequate remedy at law. For instance, the Legislature has not forbidden the issuance of a writ if another adequate remedy exists. (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 366 (*Phelan*).) Alternatively, the Legislature has not expressly given trial courts the authority to consider the merits of a writ petition when there is a plain, speedy and adequate remedy at law.

B. Case Law Addressing Alternate Remedies at Law

Based on what the Legislature addressed in section 1086 of the Code of Civil Procedure and what it left open, California courts have “established as a general rule that the writ will not be issued if another such remedy was available to the petitioner. [Citations.]” (*Phelan, supra*, 35 Cal.2d at p. 366; see *Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 205 (*Flores*).)

Our Supreme Court’s description of the rule as “general” leads us to conclude that exceptions exist and, where there is a plain, speedy and adequate remedy at law, trial courts have the discretion to dismiss the petition on that procedural ground or, alternatively, to consider the merits of the petition. Where a trial court has discretionary

power to decide an issue, an appellate court will not disturb the trial court's exercise of that discretion without a clear showing the trial court exceeded the bounds of reasons and its decision resulted in injury sufficiently grave as to amount to a manifest miscarriage of justice. (See *Brawley v. J.C. Interiors, Inc.* (2008) 161 Cal.App.4th 1126, 1137 [general test for abuse of discretion].)

As to the underlying issue of whether there is a "plain, speedy, and adequate remedy" at law for purposes of Code of Civil Procedure section 1086, courts treat that issue as a question of fact and its resolution depends upon the circumstances of each particular case. (*Flores, supra*, 224 Cal.App.4th at p. 206.) The burden is on the petitioner to show that he or she does not have such a remedy. (*Id.* at p. 205.) The superior court's determination of whether there is a plain, speedy and adequate remedy at law and whether the petitioner has carried his or her burden are regarded as matters largely within the court's sound discretion. (*Id.* at p. 206.)

II. DISMISSAL OF PETITION FOR WRIT OF MANDATE

A. Contentions of the Parties

1. *Appellants*

Appellants contend that the trial court erred in dismissing their petition for writ of mandate on the ground that adequate alternative remedies of injunctive and declaratory relief were available. They cite *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328 for the proposition that the availability of an action in declaratory relief does not prevent the use of mandate. (*Id.* at p. 343, fn. 20.) They also cite *California Teachers Assn. v. Nielsen* (1978) 87 Cal.App.3d 25 for the principle that in suits against public entities "the availability of injunctive relief is not a bar to mandate." (*Id.* at pp. 28-29.) In addition, they argue:

"Mandamus, rather than mandatory injunction, is the traditional remedy' to require government officials to obey the law. [(*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442.)] The superior court's rule

would turn the use of the writ of mandate on its head and essentially eliminate the use of the writ of mandate against government agencies, because injunctive and declaratory relief will *always* be possible alternatives to mandamus. *See id.* (mandate and injunctive relief)”

Appellants contend they have a right to a writ of mandate if they establish the ordinances are unconstitutional and this right is unaffected by the availability of declaratory or injunctive relief.

2. *City*

City contends the dismissal of the petition for writ of mandate must be affirmed because the trial court found that plain, speedy and adequate alternative remedies were available in the form of declaratory or injunctive relief. Based on this finding, City argues that the trial court was well within its discretion in dismissing the mandamus claim.

3. *County*

County’s respondent’s brief acknowledged the possibility that this court might uphold the dismissal of the petition for writ of mandate on the procedural ground adopted by the trial court, but did not argue directly that the procedural ground was correct. Instead, County argues the merits, asserting the petition should be denied “even if this Court disagrees with the lower court regarding whether mandate will issue against the government regardless of whether injunctive and declaratory relief are also available.” During oral argument, counsel for County asserted that the procedural ground adopted by the trial court provided a basis for affirming the trial court’s order.

B. The Dismissal Was Not an Abuse of Discretion

First, we conclude that the law does not make dismissal of a writ petition automatic once the trial court finds the petitioner has a plain, speedy and adequate remedy at law. (Code Civ. Proc., § 1086.) There are exceptions to the rule stated in *Phelan* that a writ of mandate will not issue if an adequate legal remedy is available. (See pt. I.B, *ante.*)

Second, we disagree with appellants' position that they are *entitled* to pursue a petition for writ of mandate regardless of whether they have a plain, speedy and adequate remedy in the form of injunctive or declaratory relief. Under applicable law, a trial court has the discretionary authority (not a mandatory obligation) to consider a petition for writ of mandate after finding that the petitioner has a plain, speedy and adequate remedy at law. In other words, once the court makes such a finding, the dismissal of the petition is committed to the discretion of the trial court. (*Flores, supra*, 224 Cal.App.4th at p. 205.)

Based on the foregoing rules, the question presented is whether the trial court abused its discretion in the circumstances of this case because appellants have not expressly challenged the underlying finding of fact that they had adequate legal remedies. The test for an abuse of discretion is whether the trial court exceeded the bounds of reason, which requires a clear showing of abuse along with a resulting injury. (See *Brawley v. J.C. Interiors, Inc., supra*, 161 Cal.App.4th at p. 1137.)

Here, appellants have argued the trial court committed error based on the incorrect view that they are entitled to have their writ petition decided on its merits despite having alternative legal remedies available. Based on this approach, they have not attempted to show that the trial court exceeded the bounds of reasons when it (1) relied on section 1086 of the Code of Civil Procedure and related cases and (2) restricted appellants to seeking declaratory and injunctive relief. In particular, appellants' appellate briefing did not provide an explanation for why requiring them to pursue those remedies exceeded the bounds of reason and was injurious.

During oral argument, counsel for appellants argued that writ relief is more convenient than pursuing declaratory relief through a motion for summary judgment. This argument can be interpreted as an attempt to show the trial court exceeded the bounds of reason by dismissing their petition for writ of mandate. If interpreted in this manner, we conclude that this argument regarding convenience is insufficient to make a clear showing that the trial court acted unreasonably (i.e., exceeded the bounds of reason)

by requiring appellants to pursue declaratory or injunctive relief instead of a writ of mandate. (See *Brawley v. J.C. Interiors, Inc.*, *supra*, 161 Cal.App.4th at p. 1137.)

C. Appellants' Waiver of Argument

During oral argument, counsel for appellants argued that County “never raised the procedural issue” relating to the adequacy of legal remedies in this case and, as a result, County waived any contention that this court should not reach the merits of the writ petition. We reject this argument because, in fact, County did raise the procedural issue in the trial court and also referred to the issue in its appellate brief.

County’s answer is part of the appellate record. County’s fourth affirmative defense is labeled “Adequacy of Remedy at Law” and asserts that appellants “have a complete and adequate remedy at law.” We conclude the inclusion of this affirmative defense in County’s answer to appellants’ petition and complaint was sufficient to raise the procedural issue decided by the trial court in its order dismissing the petition for writ of mandate.

In this court, part IV of County’s respondent’s brief includes oblique references to the procedural issue. County’s brief explicitly acknowledged the possibility that this court could affirm the trial court’s decision on the rationale set forth in the trial court’s order and, in effect, left it to City’s respondent’s brief to provide a detailed analysis of the adequacy of appellants’ alternative remedies and the trial court’s application of section 1086 of the Code of Civil Procedure.

We conclude County has not waived or forfeited the adequate-legal-remedies defense set forth in its answer. First, even if County had failed to file a respondent’s brief, that failure would not be treated as a default (i.e., an admission of trial court error) or a waiver of arguments supporting the trial court’s order. (See Cal. Rules of Court, rule 8.220(a)(2); *In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1078, fn. 1.) Where a respondent’s brief is not filed, appellants still bear the affirmative burden of showing

prejudicial error. (*Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1077; see *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [appellants must affirmatively demonstrate error because order of trial court is presumed correct].)

Second, appellants have provided no legal authority for the proposition that a *respondent* waives or forfeits an argument if it does not provide a detailed argument on appeal where (1) the trial court's order adopted that argument as its rationale and (2) another party in the appeal has presented a detailed analysis of the issue. In such circumstances, a waiver or forfeiture cannot be justified by procedural due process concerns relating to notice and an opportunity to be heard because, as in this case, appellants would have been given notice of the trial court's rationale and a full opportunity to challenge that rationale when they presented their arguments on appeal. Therefore, appellants cannot claim surprise by our decision to affirm the trial court on the grounds stated in its order and argued before this court in City's respondent's brief.

DISPOSITION

City's motion for judicial notice of its city charter is denied. Appellants' request for judicial notice of various administrative penalties upheld by County during September and October 2014 is denied.

The order dismissing appellants' petition for writ of mandate is affirmed.
Respondents shall recover their costs on appeal.

FRANSON, J.

WE CONCUR:

HILL, P. J.

PEÑA, J.